No. 10077

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OMAHA WOODMEN LIFE INSURANCE SOCIETY,
a corporation,

Appellant,

vs.

HARRY E. KRUSSMAN, as Trustee of an Express Trust,

Appellee.

APPELLANT'S REPLY BRIEF

Upon appeal from the District Court of the United States for the District of Idaho, Eastern Division

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A short reply brief is deemed advisable particularly for the purpose of suggesting wherein it is thought the argument of the appellee fails to answer the appellant's position and overlooks certain controlling facts and principles of law which must determine this case. It is further desired to consider some of the cases relied upon by the appellee and to point out why in this case the usual presumptions in support of the findings of the trial court does not prevail.

I.

It is to be observed from the appellee's brief that very little attention has been given to certain provisions of the

contract but, on the contrary, an attempt is seemingly made to avoid these contractual obligations by asserting waivers on the part of the appellant. These waivers are asserted, notwithstanding the fact that the appellant did precisely that which it was required to do under the contract and is now merely asserting the rights to which it, and the members of the Society, are entitled. It is thought proper to give brief consideration to the character of the contract and restate some of the controlling provisions and the law applicable thereto.

In considering this type of case it is necessary to understand that a member is both insurer and insured. The members of the Society prescribe the contract and make and amend the Constitution, Laws and By-Laws. These instruments which form part of the contract, do not contain "ex parte declarations" as is erroneously said in Woodmen of World Life Insurance Society vs. Garner, 140 S. W. (2nd) 414, quoted on page 26 of appellee's brief. Rather, they contain the contractual rights and requirements which the members themselves adopt.

A failure to recognize this point has lead some courts into error. There are approximately 350,000 members who have insurance in this society (R.182). These members have made the contract binding upon each other and upon the deceased and his beneficiaries in this case. The restrictive phases of this contract are for the mutual protection of all of the members. The contract is designed to give the maximum amount of benefit with reasonable expense and protection. Accordingly, the provisions of the automatic suspension for non-payment of monthly dues and reinstatement of the member upon pay-

ment within time if in good health, saves frequent necessity of re-applications, physical examinations and many other details which otherwise would be necessary and expensive. We most respectfully submit that we believe the trial court in the case at bar failed to give due consideration to the background of this contract and its terms.

The Supreme Court of South Carolina, in the case of Perry vs. Sovereign Camp, 174 S. E. 397, in reversing the trial court, said:

> "Naturally he sympathized with the plaintiff in this action and his sympathy led him to lose sight of the fact that this fraternal order is made up of a great many thousands of persons whose insurance rights can only be protected and served by the enforcement by the Sovereign Camp of the Rules, By-Laws and Constitution of the Order, which the members themselves have adopted. The payment of claims which are forfeited by the laws of the Order reduces and endangers the security of the claims rightfully due under and protected by these laws. Claims are paid by assessments on the members. It is manifestly unfair to entail such assessments on members who have maintained themselves in good standing in favor of those who, through neglect or misfortune have failed to do so."

The character of a contract of a fraternal association is further elucidated in Sovereign Camp vs. Hart (Ga.) 200 S.E. 296. Attention has heretofore been called to the fact that this contract and the method of its making has been given full statutory sanction in the State of Idaho by legislative enactment after the decision of the case of Rasicot vs. Royal Neighbors, 18 Ida. 85.

See: Chapter 23 of Title 40 of the Idaho Codes Annotated, 1932.

This code contains Sec. 40-2309, which, among other things, provides:

> "Every Certificate issued by any such Society * * * shall provide that the Certificate * * * the Constitution and Laws of the Society and the Application for Membership * * * and all amendments to each thereof, shall constitute the agreement between the Society and the mmeber."

It is ,therefore, a matter of determination in this case as to whether or not the terms of the contract will be enforced or various terms disregarded. We do not believe, under the evidence adduced, there is or can be any question of waiver by the corporate officers, for they did nothing that they were not required to do by the terms of the contract, and had no information whatever of the ill health of Mr. Krussman when delinquent payments were accepted, but necessarily relied upon his warranty of good health.

The Appellee, inhis Brief, argues that Mr. Krussman never became suspended as a member because, as we understand his argument, the payment of his monthly dues were made and received quite regularly in the month following the month within which they became due. To illustrate the fallacy of this position we beg leave again to refer to and quote briefly from some of the pertinent provisions of the contract and call attention to a few undisputed facts. The certificate, among other things, provides:

> "If the payments required by the Constitution, Laws and By-Laws of the Association are not paid by the member, this Certificate shall become null and void. Should this Certificate become void for any cause, acceptance of any payment from or for the member, or other act by any camp officer or members of the Association thereafter, shall not operate as an estoppel or as a waiver of the terms of this contract." (R.6).

Sec. 63 (a) provides that the monthly installments must be paid for the month in which they become due, and Sec. 63 (b) is as follows:

> "Sec. 63 (b). If he fails to make such payment on or before the last day of the month he shall thereby become suspended, his beneficiary certificate shall be void, the contract between such member and the Association shall thereby completely terminate.* * *" (Pls. Ex. 3).

This section was slightly amended at the 1939 convention, as appears on Page 6 of Appellant's original brief.

Sec. 65 of the Constitution, Laws and By-Laws is of particular importance. The section in force in 1935, when Mr. Krussman became a member, was slightly amended in 1937 and also in 1939, and the full sections as amended in each instance are set out in full and at length in Pages 7, 8, and 9 of the Appellant's original brief. Briefly, it is provided therein that any person who has become suspend because of non-payment of any installment of assessment, if in good health, may, within three calendar months after the date of his suspension, again become a member by paying the delinquent installments, and that the payment of such installments shall be for the

purpose of again making him a member, and shall be held to warrant that he is in good health and will remain in good health for at least thirty days thereafter, and said assessments shall be received and retained without waiving any of the provisions of this section or of these laws until such time as the Secretary of the Association shall have received actual, not constructive, or imputed knowledge that the person was not in fact in good health when he attempted to again become a member. Provided, that the receipt and retention of payment of such installments of assessments, in case such a person is not in good health, shall not make such person a member, or entitle him or his beneficiary or beneficiaries to any rights whatever.

Sec. 66 of the Constitution, Laws and By-Laws, quoted on Page 10 of Appellant's Brief provides that the retention by the Association of any installment paid by any member after he has become suspended, shall not constitute a waiver of any of the provisions of the Constitution, Laws and By-Laws, or any estoppel upon the Association and that any attempt by a suspended member to again become a member shall not be effective for that purpose unless such person be in fact in good health at the time he again attempts to become a member, and for thirty days thereafter, and that the payment of any delinquent installment shall be a warranty that the person is and will remain for such period of time in good health, and that if the warranty is not true the Certificate shall be null and void.

It is conceded that Mr. Krussman was frequently delinquent in making his monthly payments but they were always

tendered within the time provided in the contract for reinstatement. The appellant accepted them for such purpose (R. 219-20) and for no other. It treated Mr. Krussman as suspended and reinstated a number of times. This is clearly proved by Defendant's Exhibit No. 18 (R.216) which was described at the trial as the membership card (R.216) kept by the Society, and the explanation of such card made by Mr. Pakes (R. 215-17). This card shows a number of suspensions and also a number of reinstatements. Mr. Pakes called attention to seven suspensions and seven reinstatements (R.216-17). There are some others shown on the card. This undisputed evidence proves Mr. Krussman was treated as suspended a number of times and reinstated upon payment of delinquent dues and is contrary to the courts findings "that the insured was not suspended" (R.56,67). Accordingly, not only do we have the contractual automatic suspension and reinstatement but the actual treatment of the member as such by the Society. Appellee's argument, and the courts finding, therefore, that "the Appellant always treated the insured in good standing and that the payments made by the insured were not for reinstatement" (App. Br. Page 16), is not only without support in fact but directly contrary to the undisputed evidence.

Appellee, in his brief, contends that the deceased commenced falling in arrears with his payments after September, 1936, and that Sec. 65 above referred to provided that for reinstatement the member must pay delinquent payments, including the installment for the current month. Appellee further contends that payment was made without including the amount for the current month and therefore, he contends, this shows "that appellant was acceping said payments for contin-

uing the certificate in force and not for reinstatement" (App. Br. p. 17). This argument is contrary to the evidence. As above stated Defendant's Exhibit 18 and Mr. Pakes testimony shows positively suspension and reinstatement a number of times (R.216,-17). It is therefore apparent the Society did not construe this provision like appelle construes it. However, this provision of the Constitution was amended in 1937, becoming effective September 1st of that year, and by the amendment eliminated the provision requiring payment for the current month, so that thereafter the payment of delinquent installments was certainly all that was required for reinstatement, providing the warranty of good health was true. Accordingly, when, in July, 1938, Mr. Krussman suffered his first stroke, his contract was controlled by the amended By-Law.

In the face of the provisions of the contract above referred to, which have been restated in part, for the convenience of the Court, it is certainly apparent that the Society had no alternative but to accept these delinquent payments, but they were tenderd with a warranty and for reinstatement.

As is said in White vs. Sovereign Camp, 192 S. E. 161, on Page 166, wherein the Court discusses a similar question:

> "The insurer, appellant herein, had the right to accept said dues—more than that, was compelled to accept said dues or assignmens, but was protected by the contract to the extent that the acceptance and retention by it of these dues was not a waiver of the condition that the insured was in good health and would remain in good health for a period of thirty days thereafter."

In other words, the Appellant did that which it was

required to do by its contract in the acceptance of said delinquent payments. It was a right given the member to make such payment and to now say that the acceptance thereof, under such circumstances, creates a waiver, does violence to the very terms of the contract and says that the Society is penalized for doing that which it was required to do and that the provision of the contract which provides that such acceptance will not constitute a waiver is meaningless. The well considered cases on this point cited in Appellant's original brief do not tolerate such construction.

But, appellee argues, Mr. Krussman was not given notice that his contract was forfeited and that the acceptance of these payments led him to believe that the contract was in full force and effect. This again does violence to the very terms of the contract. There is no notice required therein and the terms of the contract are to the contrary. A member is conclusively presumed to know the terms of this contract and the effect of each provision. The provisions are self-operative and automatic and no notice of forfeiture is necessary.

See such cases as:

Van Dahl vs. Sovereign Camp (Neb.) 264 N. W. 454;

Whitehorn vs. Royal Arcanum (Neb.) 269 N. W. 821;

Tatro vs. Modern Woodmen of America (Ill.) App. 2 N. E. (2) 107;

White vs. Sovereign Camp WOW (S.C.) 192 S.E. 161;

Whitlow vs. Sovereign Camp (Ia.) 202 N. W. 249;

Sovereign Camp vs. Moraida (Tex.) 113 S. W. (2) 177.

and numerous other cases cited under Points and Authorities on Pages 21 to 28 of Appellant's original brief.

These cases further definitely establish the point that when a member fails to make payments as provided he is automatically suspended and the acceptance by the Society of delinquent payments are for the sole purpose of reinstatement and for no other purpose.

The argument that Mr. Krussman was led to believe he was in good standing has no point, therefore, because his contract provided otherwise and he was conclusively presumed to know its terms.

The Appellee argues that Mr. Krussman received certain letters from the Society with refund checks and that these further led him to believe that he was in good standing. This argument is indulged in on pages 18 to 20 of Appellee's Brief. A complete answer to this argument is that those letters and checks which preceded Mr. Krussman's ill health are immaterial and of no consequence because Mr. Krussman was then in good health and subject to reinstatement and the one that was sent thereafter was sent without knowledge on the part of the Society that his warranty of good health made by the tender of delinquent payments was untrue. The sending of these letters and the refund chcks are explained by Mr. Pakes in his deposition. This action was based upon the reports the

Society then had as to the payments made by Mr. Krussman, but without any information whatever as to his ill health. The very fact that they were sent indicate strongly that the Society had no knowledge of his condition of health, and obviously the appellee cannot properly contend that the Appellant, having been misled, should now be estopped when it learns the true facts.

Appellee argues, on pages 21 and 22 of his brief, that assuming for the purposes of argument that the question of reinstatement is involved, the question of Mr. Krussman's ill health was either known to the officers of the Society or "would be imputed to Appellant." There is no dispute but that Mr. Krussman was not in good health after July, 1938. As we understand Appellee's argument, it is to the effect that the Financial Secretary of the Pocatello lodge, who was dead at the time of the trial, must have known of the insured's illness and that it was his duty to report on the "standing of the members" and that while Mr. Pakes, Assistant Secretary, testified by deposition that he had no knowledge of Mr. Krussman's illness, and so far as he knew, no other officer did (R.208), yet, Appellee argues, it is quite probable that the Secretary or Auditors of the Society may have received knowledge and that the Assistant Secretary did not testify that he had made sufficient examination of the records or files to ascertain whether or not there was any letter or notice of ill health of the insured. This argument, we think, is without merit. The question of waiver was pleaded by Appellee (R.10-12) and the burden of proving the same necessarily rested upon him. It is fundamental that one relying upon a

waiver or an estoppel must prove the same. If Mr. Krussman had been suspended and his certificate become void for the non-payment of his dues, which Appellant most certainly contends was the case, then the burden rested upon the beneficiary to prove the reinstatement.

In the case of Burke vs. John Hancock Mutual Life Insurance Company (Mass.) 195 N. E. 507, it is held:

> "Beneficiary had burden of proving reinstatement of lapsed life policy and truth of statements in Certificate of insurability which was a condition precedent to reinstatement."

In National Council of K. and L. of Security vs. Smiley, (Fla.) 100 So. 153, it is held:

> "The beneficiaries under a mutual benefit insurance policy brought suit to recover the face of the policy and damages. At the trial they introduced the policy and rested. The insurer offered its pleas, supported by testimony, to the effect that at the time of death the insured had been suspended from membership in the society for non-payment of dues as required by its Constitution and By-Laws. *Held* that this was a complete defense and shifted the burden to plaintiffs, the beneficiaries, of showing by competent, preponderating testimony that the insured was at the time of her death a member in good standing of the defendant society."

There was no attempt made by the Appellee to show a reinstatement, notwithstanding the definite proof of automatic suspension by failure to make timely payments and the serious breach of warranty of good health. Notwithstanding

the fact that the burden rested upon the Appellee to prove reinstatement, which burden was not in any sense fulfilled, the Appellant proved that it had no such knowledge (R.208). Furthermore, it is to be noticed that some of the suspensions and reinstatements shown on Defendant's Exhibit 18 and stated by Mr. Pakes (R.217) occurred after Mr. Krussman became ill and certainly this could not have happened if the Society knew he was in ill health. This was proof of a negative so far as the Society was concerned. Such requires but slight proof even if we admit, for safe of argument, that we had this burden. Douglas vs. Kenney 40 Idaho 412, 423, 233 Pac. 874. The trial court does not find that the Society had actual knoweldge of Mr. Krussman's ill health but that the Financial Secretary knew of it and that it is "presumed" he advised the appellant, and if not ,such knowledge "would be imputed to the defendant." (R.69).

As appears from reference to Sec. 65, supra, and as argued in Appellant's original brief, there could be no "constructive or imputed knowledge." It must have been "actual knowledge" on the part of the Secretary. Whether or not the Financial Secretary had information of Mr. Krussman's ill health is immaterial. His requirement to report on "the standing of members" as stated in Appellee's brief, is no more than a report on the payments made by them.—not upon their condition of health. If he failed to make reports or reported erroneously, such would not constitute a waiver nor affect the contractual rights of the parties.

Sovereign Camp W. O .W. vs. Muller (Ga.) 11 S. E. 2nd, 92;

United Moderns vs. Pike (Mo.) 76 S. W. 774.

Furthermore, as heretofore suggested, any information gained by the Financial Secretary would be wholly immaterial and could not be considered a waiver. On the very face of the Certificate issued and as pleaded in Appellee's complaint, there appears the following:

> "IMPORTANT. No camp or officer thereof, nor any officer, employee or agent of the Assoc. has authority to waive any of the conditions of this Beneficiary Certificate or of the Constitution and Laws of this Association." (R.7-8).

In addition to the foregoing, the Constitution provides precisely the same thing in Sec. 109 (g), to the effect that that:

> "The Financial Secretary shall not, by acts, representations or waiver, nor shall the Camp by vote or otherwise, or any of its officers ,have any power or authority to waive any of the provisions of the Constitution, Laws and By-Laws of this Society, nor bind the Society by any such acts." (R.66).

The foregoing has statutory authorization in Idaho. See particularly Sec. 40-2331 I. C. A. 1932. Accordingly, therefore, there could be no imputation of knowledge of Mr. Krussman's ill health and not only did the Appellee fail to prove reinstatement, but the record shows no knowledge of ill health on the part of the Society and consequently no possibility of a waiver of this warranty or of reinstatement. See particularly

Sov. Camp W. O. W. vs. Cameron, (Tex.) 41 S. W. (2) 283;

Sovereign Camp W. O. W. vs. Moraida (Tex.) 113 S. W. (2) 177;

Salter vs. Security Benefit Assoc. (Kas.) 243 Pac. 1033;

Kiker vs. Sov. Camp W. O. W. (Ala.) 167 So. 313;

and other cases cited under Points and Authorities No. VI. of Appellant's original brief.

II.

In Appellant's original brief, some consideration was given to cases upon which it was anticipated Appellee would rely, and which cases were referred to in the opinion of the trial court (Appellant's Brief, pages 58 to 63). We desire to give some attention to a few additional cases cited in Appellee's brief, and upon which it seems considerable reliance is placed.

Appellee quotes from the case of Steuernagel vs. Supreme Council of Royal Arcanum, (N. Y.) 137 N. E. 320. In this case the member had been missing for a number of years, but his family had apparently kept up his dues. It appears that under such circumstances the By-Laws required a "prescribed notice" to be sent by registered mail to the last known address of the missing member, and that "no assessments nor dues shall thereafter be received from him or on his account." The notice was not sent and the dues were received by the Supreme Council. The By-Laws are entirely different from those considered

in the case at bar and the facts are so dissimilar that the case does not appear to be helpful to the Appellee.

In the case of Harris vs. Sovereign Camp W. O. W. (Ill.) 15 N. E. (2d) 793, cited by Appellee and from which appears a copious quotation, attention should be called to the fact that when this case arose Illinois did not have a statute similar to Sec. 40-2331 I. C. A. 1932, which, as heretofore stated, provides that a fraternal benefit sociaty might provide in its Constitution, Laws and By-Laws that no local Camp or officer thereof might waive any provision of the Constitution, Laws and By-Laws. The absense of such statutory provision explains the Harris case. The existence of such a provision explains the Moraida case (Tex.) 113 S. W. (2d) 177.

Appellee cites and quotes from Schrum vs. Sovereign Camp W. O. W. (Mo.) 132 S. W. (2d) 1091, wherein past due installments had been accepted without current installments having been paid. It is to be observed, however, that the case arose before the amendment of Sec. 65, wherein the requirement of paymnt of current installments was eliminated. In the Schrum case the insured died on August 18, 1937. On September 1, 1937, the amended By-Law became effective, permitting the payment of past due installments without the necessity of payment of current installments, and providing that such may act as a reinstatement if the insured be in good health and remains so for thirty days. Accordingly, the amendment of this provision of the Constitution eliminates the Schrum case as an authority against the Appellant in the case at bar, for here Mr. Krussman's ill health did not commence until after the amendment of the said By-Law.

The Appellee gives considerable attention to the case of Palmer vs. Sovereign Camp, W. O. W. (S.C.) 15 S. E. (2d) 655. This case is cited by the Appellee principally to sustain the charge that the knowledge of the Financial Secretary was knowledge of the Appellant. A reading of the case discloses the fact that it is predicated largely upon the decision "in the Wimberly Case." The conclusion in the case that the knowledge of the Financial Secretary might, under some conditions, create a waiver or an estoppel is based upon Sec. 8072 on the South Carolina Code, 1932. This section is as follows.

> "(8072). Who are agents of fraternal associations. When any fraternal insurance or beneficiary society, order or association of this or any other state, province or territory, now or hereafter operating within this state, and having lodges, councils, chapters, branches or subordinate or branch offices duly established and organized in this state, and when, under the laws, rules or regulations of such said society, order or association, members of the same are required to pay, or customarily and with the knowledge and consent of such said society, order or association, do pay premiums dues, assessments, fines, or other payments to any other member or person for the purpose of transmitting or delivering the same to the general office, or to any division, subordinate or branch office of such said society, order or association, then, such said member or person by whatever name or title known and called, so collecting such premiums, dues, assessments, fines and other payments, shall be deemed and considered the agents of such said fraternal insurance or beneficiary society, order or association."

Idaho does not have such a statute as the South Carolina Statute and under the laws and Constitution of the Society and

the fraternal code in Idaho, as pointed out in Appellant's original brief, the Financial Secretary is one of the very limited powers and does not have such power as would enable him to waive any provisions of the contract or to "impute" knowledge to any officer. The Palmer case can be more fully understood if consideration be given to the case of Wimberly vs. Sovereign Camp, 2 S. E. (2) 532, wherein the question of waiver was entirely predicated upon the existence of Sec. 8072 of the South Carolina Code. In this case Sec. 8047 of the South Carolina Code, which corresponds with Sec. 40-2331 of the Idaho Code, and Sec. 8072, which Idaho does not have, are considered, and it is pointed out in said opinion that because of the existence of this latter section enlarged powers are vested in the Financial Secretary, which would not have been the case without the enactment of such a statute.

The case of Satcher vs. W. O. W. Life Ins. Soc. (S.C.) 18 S. E. (2d) 523, also relied upon by the Appellee, is naturally and necessarily controlled by the Palmer case, and is subject to the same explanation. It is significant to note that earlier South Carolina cases, which were decidede apparently before the enactment of said statute, are in effect, quite contrary to the Palmer case. See:

White vs. Sovereign Camp (S. C.) 192 S. E. 161;

Roberts vs. Sovereign Camp (S.C.) 164 S. E. 893;

Perry vs. Sovereign Camp (S. C.) 174 S. E. 397.

If South Carolina had but one section of statute, namely, Sec. 8047, which is the same as Sec. 40-2331 I. C. A. 1932,

and the same as Article 4846 of the Texas Statutes, considered in the case of Sovereign Camp vs. Moraida, 113 S. W. (2d) 177, the South Carolina Court would probably have concluded, as the Court did in the Moraida case, that:

> "The legislature was not without power to grant fraternal benefit societies the authority conferred by Article 4846, and the exercise of such power cannot lawfully be thwarted by judicial decrees."

It would extend this reply brief to undue length if each case were considered. A number of other cases relied upon by the Appellee are subject to similar distinctions and we most sincerely suggest these cases are either different in facts or constrolling statutes or else the fundamental provision of the contract have either been overlooked or disregarded. As said by the Texas Court in the Moraida case:

> "Apparently the effect of Article 4846 and the binding effect of the provisions of the Constitution, Laws and By-Laws of the Association adopted pursuant thereto, were overlooked and disregarded."

III.

The Appellee argues that the findings of the trial court are supported by substantial evidence and that "the same will not be disturbed." (P. 37 Appellee's Brief). On page 13 of Appellee's Brief there is quoted Sec. 11-219, Idaho Code Annotated, as an authority for the foregoing statement.

The Appellant contends (Specifications of Error 1 to X) that the findings of the trial court, attacked in said specifica-

tions, are in some instances erroneous conclusions of law, in other instances mixed questions of law and fact, and generally are not supported by substantial evidence, but contrary thereto. Under such circumstances these findings are not binding upon an appellate court.

It is held in Foote Bros. Gear & Mach. Corp, vs. National Labor R. Board, 114 Fed. 611, that:

> "The determination of conclusions from the facts is not within exclusive function of fact finder, but is subject to rejection by the appellate court."

Furthermore, it is to be observed from the record that substantially all of the testimony upon which the Appellee relies and urged in support of said finding was taken by depositions. These depositions brought into evidence the exhibits.

In Cannon vs. Seyboldt, 55 Ida. 796, 48 Pac. (2d) 406, it is held:

> "Where evidence consists of depositions, Supreme Court is in as good a position as trial judge to find facts established thereby, and must examine such evidence and determine its value."

On page 800 of the Idaho Report, the Court, with reference to the depositions says:

> "We are in as good position as was the trial judge to find facts established solely by depositions, and it is our duty to examine such evidence and determine its value."

As authority for this statement the Court cites thirteen Idaho cases.

In Webb vs. Gem State Oil Company, 56 Ida. 465, 55 Pac. (2d) 1302, on Page 1306 it is said:

> "All the testimony in this case was produced at the hearing before the Industrial Accident Board and the depositions of the witnesses were presented to the trial judge. Since these depositions are before us we are in as good position as he was to find facts established by them, and it is our duty to examine the evidence and determine its value. Cannon vs. Seyboldt, 55 Ida. 796, 48 Pac. (2d) 406-407, and cases therein cited on this point."

In John Hancock Mutual Life Insurance Company vs. Girard, 57 Ida. 198, 64 Pac. (2d) 254, on Page 255, the same rule is announced.

In the case of Jaussaud vs. Samuels, 58 Ida. 191, 71 Pac. (2) 426, on Page 431 it is said:

> "In approaching this qeustion, we are not unmindful of the rule that findings of fact made by a trial judge from conflicting testimony will not be disturbed on appeal if the testimony tending to support them would be sufficient to do so if uncontradicted. That rule, however, has no application in this case. The evidence on this point is nearly all documentary and the little which is not is undisputed. Cannon vs. Seyboldt, 55 Ida. 796, 48 Pac. (2) 406, and cases therein cited on this point."

This is the rule announced by the Ninth Circuit Court of Appeals.

In Rown vs. Brake Testing Equipment Corporation, 38 Fed. (2) 220, on Page 223, it is said:

> "All the testimony upon the issue having been taken out of the trial court, by deposition the presumption in support of findings based upon conflicting testimony in court does not prevail. U. S. vs. Booth-Kelley El. Co. (9 C. C. A.) 203 Fed. 423, 429; Id. 237 U. S. 481, 135 S. Ct. 659, 59 Law Ed. 1058."

In Paraffine Companies vs. McEverlast, Inc. 84 Fed. (2) 335, on Page 339, the Ninth Circuit Court again says:

> "The evidence presented by the defendant on this issue was all in the form of depositions. Hence, there is no presumption in favor of the trial court's findings thereon."

We have heretofore suggested that a number of the findings of the trial court are really conclusions of law or at best mixed qupestions of law and fact.

In U. S. vs. Anderson, 108 Fed. (2) 475, on Page 479, the Seventh Circuit Court of Appeals says:

> "* * * Where the ultimate finding is a conclusion of law, or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court, Bogardus vs. Commissioner, 302 U. S. 34, 39, 58 S. Ct. 61, 82 L. Ed. 32."

All of the foregoing authorities apply with considerable force in the case at bar. Under the facts as disclosed by the entire record, and particularly because of the exhibits and

depositions, the findings of the trial court are not entitled to the usual weight given to findings on appeal but the Appellate Court has the right to examine the evidence and determine the true facts and draw its conclusions therefrom. This, we most respectfully urge, must result in a reversal.

CONCLUSION

In conclusion it is most respectfully suggested that the Appellee has not answered the Points, Authorities and Argument urged in Appellant's Brief and that Appellants specifications of Error are, and each of them is, well taken, and the judgment of the trial court should be reversed and the case dismissed.

Respectfully submitted,

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